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Goffstown Truck Center, Inc. and Chauffeurs, Teamsters and Helpers Local 633, a/w International Brotherhood of Teamsters, Petitioner. Case 1–RC-22272

July 21, 2009

# DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The National Labor Relations Board has considered objections to an election held on December 12, 2008, and the hearing officer's report recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 26 for and 19 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings<sup>2</sup> and recommendations only to the extent consistent with this Decision and Direction of Second Election.

For the reasons set forth below, we find merit in the Employer's objections alleging that weather conditions on the election date denied the employees an adequate opportunity to vote, and that a determinative number of eligible voters did not vote. Consequently, we shall direct a second election.

### I. FACTS

The Employer provides school-bus service for the Town of Londonderry, New Hampshire. The election was conducted in a unit of school bus drivers at the Employer's Londonderry facility. A severe ice storm hit Londonderry the night before the election and persisted throughout election day. As a result, downed trees and fallen power lines laden with ice blocked or obstructed many of Londonderry's roads, including the two access roads leading to the polling place.

Because of the severity of the ice storm, New Hampshire's Governor declared a state of emergency on the morning of the election. The Governor urged citizens to avoid unnecessary travel and to plan for prolonged power outages. Londonderry's schools were closed, and consequently the employees' work was cancelled. In addition, the polling place lost its heat, electrical power, and telephone service, and some employees lost those services in their homes. Two days after the election, President George W. Bush ordered Federal aid and mobilized the Federal Emergency Management Agency (FEMA) to supplement state and local response efforts. Thousands of New Hampshire citizens, including some of the Employer's employees, were without power for days as a result of the storm.

Despite the storm, the Region proceeded with the election as scheduled. As described above, the tally of ballots favored the Union by seven votes. Nine employees whose names appeared on an initial *Excelsior* list<sup>4</sup> did not cast ballots in the election.

## II. THE HEARING OFFICER'S REPORT

The hearing officer recommended overruling the Employer's election objections, citing *Baker Victory Services*, 331 NLRB 1068, 1070 (2000). In *Baker*, the Board stated that an election "should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote." The hearing officer found that the ice storm on election day was "severe and extraordinary," "perhaps unprecedented," and that a determinative number of eligible voters did not vote. However, rather than recommend that the election be set aside on that basis, the hearing officer proceeded to analyze the specific reasons why the nine nonvoters did not cast ballots. <sup>5</sup> Based on the nonvoting

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

<sup>&</sup>lt;sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>&</sup>lt;sup>3</sup> Although not cited by the hearing officer, Gerald Sirois, the Employer's manager, testified that telephones were out at the polling location on December 12.

<sup>&</sup>lt;sup>4</sup> Excelsior Underwear, 156 NLRB 1236, 1239–1240 (1966).

<sup>&</sup>lt;sup>5</sup> The hearing officer stated that she might have recommended setting aside the election, under *Baker*, supra, and *V.I. P. Limousine*, 274 NLRB 641 (1985), if the record had lacked an explanation for why the

employees' testimony and the parties' stipulations, the hearing officer found that at least four eligible employees declined to vote for reasons other than the ice storm. Consequently, the hearing officer found that the ice storm affected no more than five eligible employees, an insufficient number to affect the election result, and that a second election was not warranted.

### III. DISCUSSION

Applying Baker, supra, it is clear that the New Hampshire ice storm constituted a severe weather condition that reasonably denied employees an adequate opportunity to vote. And, as found by the hearing officer, a determinative number of eligible voters did not vote. The issue before the Board is whether the hearing officer erred by considering individual employees' reasons for not voting and by consequently concluding that the ice storm did not affect a determinative number of eligible employees. We find that the hearing officer improperly relied on this evidence. In V.I.P. Limousine, supra, a "severe weather" case, the Board explained that "the focus is not on the circumstances of why a particular individual employee was unable to vote, but instead on whether the election was conducted properly and in such a manner as to assure that all employees were given a sufficient opportunity to vote." Id. at 642. Thus, under V.I.P. Limousine, the Board does not analyze employees' individual reasons for not voting in an election, but rather will set aside an election whenever severe weather reasonably denied eligible employees an adequate opportunity to vote and a determinative number did not vote. Cf. G.H.R. Foundry Div., The Dayton Malleable Iron Co., 123 NLRB 1707, 1709 (1959) (postelection statements of employees regarding their voting intentions cannot be used as a basis for determining whether to set aside elec-

nine employees did not vote. Because the record contained such evidence, however, she decided that it should be considered in determining whether the Employer's objections had merit.

<sup>6</sup> The hearing officer noted that one employee decided not to vote "because she was torn and wanted to stay out of it," another did not vote because she did not expect to continue working for the Employer, a third employee was in Florida, and a fourth employee was summoned by his other employer, the fire department, to assist with emergency operations associated with the storm.

<sup>7</sup> In *Baker*, supra, the Board found that four feet of snow during the 2 weeks preceding the election, prompting a declaration of a state of emergency, constituted severe weather conditions that reasonably denied eligible employees an adequate opportunity to vote. In *V.I.P. Limousine*, supra, the Board directed a second election because of a severe 20-inch snowstorm, where a determinative number of eligible voters did not cast ballots.

<sup>8</sup> The Petitioner disputes the eligibility of only two of the nine employees whose names appeared on an initial *Excelsior* list. Thus, the Petitioner concedes that seven eligible employees, a determinative number, did not cast ballots. We need not and do not address the eligibility of the two employees in dispute.

tions); *Nyack Hospital*, 238 NLRB 257, 259 (1978) (Board has consistently adhered to an objective standard that does not rely on after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election).

Because the ice storm reasonably denied eligible employees an adequate opportunity to vote and a determinative number did not vote, we shall set aside the election and direct a second election.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Chauffeurs, Teamsters and Helpers Local 633, a/w International Brotherhood of Teamsters.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an

<sup>&</sup>lt;sup>9</sup> The Employer filed a motion to reopen the record to offer additional evidence in support of its severe-weather objection. Specifically, the Employer seeks to introduce evidence to demonstrate that the *Excelsior* list was amended prior to the election and that the bargaining unit actually contains 55, rather than 54, eligible employees (i.e., that 10, rather than 9, eligible voters did not cast ballots). Having sustained the Employer's severe-weather objection on the current record, we find it unnecessary to pass on the Employer's motion. Likewise, we find it unnecessary to address the Employer's contention that the Region engaged in objectionable conduct when it proceeded with the election.

eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 21, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

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